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10/672,133	09/26/2003	Stephen A. Ewald	19645.1	6111
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CARLTON FIELDS, PA 1201 WEST PEACHTREE STREET 3000 ONE ATLANTIC CENTER ATLANTA, GA 30309			SMITH, JEFFREY A	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/672,133
Filing Date: September 26, 2003
Appellant(s): EWALD, STEPHEN A.

Lance D. Reich
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed October 3,
2005 appealing from the Office action mailed June 2, 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The Examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

US 2002/0132575 A1 Kesling et al. 09-2002

US Patent Application 09/461,699 (incorporated by
reference in US 2002/0132575 A1)

(9) Grounds of Rejection

The following grounds of rejection are applicable to the appealed claims and were presented in the Final Office action mailed June 2, 2005.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless -

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-13, and 15-19 are rejected under 35 U.S.C. 102(e) as being anticipated by Kesling et al. (US 2002/0132575 A1).

Kesling et al. discloses a method for purchasing goods and services linked with broadcast media (par. 0039 and Figs. 1-3).

The method comprises receiving at at least one broadcast receiver a broadcast media including information relating to goods and services that can be purchased by persons receiving the media; selectively recording purchase data at the broadcast receiver for a good and service that a person purchases relating to the broadcast media; sending the purchase data from the broadcast receiver to at least one server; receiving the purchase data at the at least one server; and verifying the purchase data from the broadcast receiver at the at least one server.

Kesling et al. references U.S. application serial number 09461,699 and incorporates such application by reference. See Kesling et al. at paragraphs [0007]-[0010]. Accordingly, the disclosure of such application forms part of the Kesling et al. disclosure as of the date of the incorporation by Kesling et al.

Kesling et al. builds upon the system and method disclosed by '699. The '699 disclosure states that "the receiver is

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adapted to receive an input from the user by which the user is able to signal an interest in purchasing a selection of music or data being played and/or displayed" ('699 at page 2, last line-page 3, line 2). Accordingly, claims 1, 9, 12 (as amended to recite "each receiver further selectively receiving a purchase request and recording purchase data for goods and services that a person purchases relating to the broadcast media" (claim 1, for example, and similar language in claims 9 and 12)), is anticipated by Kesling et al.

Regarding claim 3: the purchase data may be transmitted at a predetermined location (par. 0043).

Regarding claims 5 and 6, respectively: Kesling discloses that the broadcast media may be an advertisement (information about the purchase of a particular good or service) or a song (no information about the purchase of a such song).

Regarding claims 7 and 8, respectively: the broadcast receiver may comprise either a single device (par. 0041) or an "intermediate transfer device" may be additionally employed as a purchase selection device (par. 0042).

Applicant's attention is directed to the Kesling et al. disclosure regarding "low" and "high" power wireless transmitters (600 and 700, respectively).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the

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art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kesling et al. (US 2002/0132575 A1) in view of Official Notice regarding secure communication channels.

Kesling et al. does not disclose a secure communication channel. However, it is notoriously well-known to employ secure communication channels when endeavoring to conduct transactions of the type disclosed by Kesling. One of ordinary skill in the art would have modified the Kesling method to have included sending purchase data via a secure channel in order that confidential information relative to the customer or the customer's account is not readily intercepted.

(10) Response to Argument

Preliminary Note: The Examiner has adopted Appellant's outline format for use in addressing Appellant's arguments.

A. "Rejection of Claims 1-13 and 15-19 under 35 U.S.C. 102(e) "

Appellant notes that Kesling et al. "allows the receiver to receive input from a listener/user indicating an interest in a given selection". Appellant then urges that such "interest in a given selection" amounts to an "informational request" and not a "purchase request". See Brief beginning at page 4.

The Examiner notes that the distinction between "informational request" and "purchase request" is in critical contention here before the Board. The Examiner has addressed this point of contention below in response to point "1".

1. "The Kesling Reference Does Not Expressly or Inherently Disclose a 'Purchase Request' "

Appellant urges that selection of button 1220 "does not cause the purchase of the product" and that Kesling et al. specifically states that the

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listener will only receive "further information".
See Brief at page 6.

The Examiner notes that Kesling et al. discloses that the user interface 1000 allows the receiver to receive input from a listener/user indicating an interest in a given selection. See Kesling et al. at par. 0041. Appellant's remarks that such indication of interest amounts solely to a request for information about a given selection fails to appreciate the full scope of the Kesling et al. disclosure (including application 09/461,699 which is incorporated by reference in Kesling et al. at par. 0007). For example, Kesling et al. offers the following scenario:

"if the listener wishes to purchase a product that has just been advertised, he can press select button 1220, and receive further information regarding the product such as price and availability. This information is preferably displayed on display 1200. The listener might even complete the transaction using radio 20....". See Kesling et al. at par. 0066.

The Examiner's position, as stated in the Final Office action at page 8, is that it appears that Kesling et al. does, indeed, disclose a "purchase request" in the manner recited in the claims. And, to clarify that "indicating an interest" in a given selection is not limited to indicating an interest in merely information about a given selection, the Examiner has directed Appellant's

attention to the '699 application at page 2, last line-page 3, line 2, which explicitly teaches that:

"the receiver is adapted to receive an input from the user by which the user is able to signal an interest in purchasing a selection of music or data being played and/or displayed". (emphasis added)

Accordingly, the entirety of the Kesling et al. reference (including the incorporated '699 application) teaches that a purchase request is received at a broadcast receiver as recited in independent claims 1 and 12.

Further, Appellant urges that the term "transaction" is not defined in the specification of Kesling, et al., as making a purchase. Appellant urges that grammatical proximity norms suggests that the most reasonable interpretation of the term "transaction" appears to be "that the transaction of the listener obtaining further information can be completed through the text messaging of the wireless transceiver". See Brief at page 6.

The Examiner notes that Appellant presents a somewhat narrow analysis of the disclosure of Kesling et al. at par. 0066 in order to conclude that the term "transaction" in Kesling et al. should most reasonably be interpreted as being

directed to a transaction for further information about a product of interest. Such analysis parses the cited paragraph and strips selective passages from their full context. It is admitted that grammatical proximity can bear heavily upon an interpretation by a reader (in this case, the skilled artisan) of an author's sentiment. However, proximity should weigh only as one factor of many factors in making such determination. In this case, the full discussion at par. 0066 conveys that Kesling et al. intends the phrase "complete the transaction" to be read in full context of their discussion of a "purchase of a product". Moreover, if the skilled artisan were to adopt Appellant's grammatical proximity analysis as controlling, the skilled artisan would have arrived at the same conclusion (i.e. that the phrase "complete the transaction" is intended to reference a purchase transaction for a product). In support of this conclusion, the skilled artisan would have relied upon a review of the entire '575 document which reveals that the term "transaction(s)" appears four times:

a first occurrence of such term appears in the Abstract where it is used in conjunction with the terms "e-commerce" and "merchandisers";

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a second occurrence of such term appears at par. 0012 where it is used in a non-descript sense;

a third occurrence of such term is at par. 66 where it is used in conjunction with a "purchase"; and

a fourth occurrence of such term appears at par. 0104 where it is used in conjunction with a "revenue", "purchased", "sell", "consumer", "profit", "purchase", and "price".

2. "The Kesling Reference Does Not Enable a Purchase Request"

Appellant urges that Kesling et al. is not an anticipatory reference that can be relied upon as prior art because it does not contain enablement for the features relied upon. Further, Appellant urges that the Examiner relies upon a "speculative statement" which lacks "clear guidance from Kesling, et al., that one can [rather than might] complete the transaction from the broadcast receiver". Finally, Appellant urges that Kesling et al. lacks a measure of technical detail which provides guidance "given to how the transaction can be done". See Brief beginning at page 6.

The Examiner notes that when the reference relied on (Kesling et al., in this case) expressly anticipates or makes obvious all of the elements of the claimed invention, the reference is presumed to be operable/enabling. Once such a reference is found, the burden is on applicant to provide facts rebutting the presumption of operability/enablement. In re Sasse, 629 F.2d 675, 207 USPQ 107 (CCPA 1980). See MPEP 2121. Appellant's allegation that Kesling et al. lacks enablement, absent any facts in support thereof, is not viewed as being persuasive.

B. "Rejection of Claim 14 under 35 U.S.C. 103(a)"

Appellant urges that "the suggested modification of Kesling et al., with an Official Notice of secure communication protocol does not disclose [a purchase request originating at the broadcast receiver]". See Brief beginning at page 7.

The Examiner notes that Official Notice was not taken for the purpose of teaching a purchase request originating at the broadcast receiver. Kesling et al. alone anticipates such limitation. Rather, Official Notice was taken for the purpose of teaching employing a secure communication channel when endeavoring to conduct transactions of the type disclosed by Kesling et al. The Examiner offered that:

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"one of ordinary skill in the art would have modified the Kesling [et al.] method to have included sending purchase data via a secure channel in order that confidential information relative to the customer or the customer's account is not readily intercepted" (see Final Office action at page 6).

Accordingly, Appellant's remarks in support of the patentability of claim 14 on this ground is not viewed as being persuasive. Moreover, Appellant has failed to provide an adequate traversal of the Noticed fact, and, pursuant to MPEP 2144.03(C), the Examiner has held that the Noticed fact has been taken to be admitted prior art. See Final Office action at page 9.

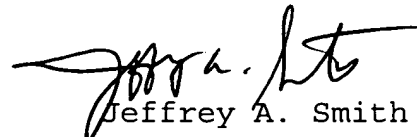
(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.


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For the above reasons, it is believed that the rejections should be sustained.


Respectfully submitted,


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Primary Examiner
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